IN THE

Supreme Court of the United States

October Term, 1950

No. 6

EDWARD L. FOGARTY, as Trustee in Bankruptcy of the Inland Waterways, Inc., *Petitioner*,

v.

UNITED STATES OF AMERICA.

REPLY BRIEF FOR AMICUS CURIAE.

(Howard Industries, Inc.)

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This is a simple case. It involves three almost self-evident propositions which are disclosed by the face of the statute and strongly reinforced by the legislative history.

1) The substitution for an existing statute of a new statute employing entirely different terminology shows that what was intended was not a mere temporal extension of the earlier statute but a change of law.

2) The statutory mandate that a

> "previous settlement * * * shall not operate to preclude further relief"

is plainly nullified by an Executive Order that

> "no claim shall be considered if final action with respect thereto was taken"

prior to a certain date.

3) There is no evidence that Congress was advised of a peculiar meaning attached by the administrators to the filing of a "request for relief." Were there such evidence, the phrase could still not be construed to require compliance with conditions impossible of fulfillment, for to do so would defeat the plain intention of Congress to grant relief.

The fact that the Government requires 80 pages of tortured analysis to explain why facts so plain are delusive should without more arouse suspicion. It would take another 80 pages to comment on every thread of the Government's web of speculation. We therefore content ourselves with comments on the highlights.

I.

THE LUCAS ACT AFFORDS BROADER RELIEF THAN THE FIRST WAR POWERS ACT.

Ignoring the "deliberate selection of language so differing from that used in the earlier acts" which, this Court has stated, "indicates that a change of laws was intended," *Brewster* v. *Gage*, 280 U. S. 327, 337 (1930), the Government urges that the Lucas Act is a mere temporal extension of the First War Powers Act. Brief for the United States, 25-33 (hereafter U. S. Brief). Had this been Congress' sole purpose, however, it would have been a simple matter to add a phrase merely extending the relief available under the First War Powers Act for another 6 or 12 months. Instead, Congress discarded the "facilitate the

prosecution of the war" formula of the First War Powers Act under which, as the Navy Department emphasized,

> "any loss resulting from business risks assumed by the contractor must be borne by him." Hearings, 4.[1]

And it wrote an elaborate new statute which in § 1 provided for settlement of

> "equitable claims of contractors * * * for losses * * * incurred * * * without fault or negligence on their part."

It did this because, as one member of the Committee early remarked:

> "I would not want to limit this in furtherance of the war, if the Government went into a contract under authority of law, and through no fault of the contractor he lost money, whether in furtherance of the war effort or peace effort, does not the same principle apply, of right?" Hearings, 28.[2]

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[1] Hearings on S. 1477, Subcommittee of Sen. Comm. on Judiciary (79th. Cong. 2d Sess., 1946). The Attorney General indicated that First War Powers Act relief required

> "findings that the prosecution of the war will thereby be facilitated, thus contemplating *a clear benefit to the United States.*" 40 Op. Atty. Gen. at 233. (Emphasis supplied throughout)

Contractors, says the Government, were merely "the incidental beneficiaries." U. S. Brief, 24-25.

[2] The Government asserts:

> "There was no indication that Congress was dissatisfied with the administration of relief under the First War Powers Act prior to V-J Day." U. S. Brief, 56.

We invite the attention of the Court to the colloquy between General Counsel Neale of the Navy Department and Chairman McCarran, set out at Hearings, 65.

> Mr. Neale: "We have had a number of cases where contractors have through bad judgment on their own part or through unfortunate circumstances unforeseeable at the time lost money but yet we could not give them relief because in our opinion they did not conform to the standards [see the relief categories, note 4, Main Brief], which we have applied

And the Chairman of the Committee, Senator McCarran, said:

> "I think that those who meritoriously contributed to the war should not be permitted to lose." Hearings, 44.

New terminology was adopted to escape from the stultifying administrative interpretation of the old and to afford the new and broader relief desired by the Congress. No satisfactory explanation for this radical shift in statutory language has been offered by the Government. And it has studiously omitted to discuss the mass of history adverse to its case (see our Main Brief, 7-14), confining itself to carefully culled excerpts which cannot withstand close analysis. Although it is arguable that in light of the plain terms of the Lucas Act there is no room for appeal to the legislative history, *Ex parte Collett*, 337 U. S. 55, 61 (1949), and cases cited, we have recounted it in our Main Brief (pp. 7-14) and shall further comment on it because it graphically reveals that the administrators, as the Congress has since unequivocally and repeatedly declared (*infra*, pp. 22-24; Main Brief, pp. 23-27), are bent upon thwarting the Congressional intent.

Without doubt, as the Government needlessly expatiates, the Lucas Act was first designed to correct the illiberal administrative interpretation which cut short relief upon

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during the war. * * * If it were something which was not at all the responsibility of the Government but just an unfortunate circumstance which arose during the performance of the contract, he was afforded the relief of a private bill. * * *."

Chmn. McCarran: "A private bill takes care of one case only."

Mr. Neale: "That is correct."

Chmn. McCarran: "There may be thousands of cases where no private bill is introduced or ever will be introduced. That will put these companies into bankruptcy or out of business. It is always an element of justice that we try to apply to those who aided us the way these companies did during the war."

See also Main Brief, note 5.

the cessation of hostilities. U. S. Brief, 25-33. But the Congress broadened its purpose when it learned in the course of the Hearings of a small group of hapless contractors who had been crushed in the jaws of war. The Government itself has pointed out that

> "the pressure of war and the uncertainties attending new types of production frequently made accurate estimates of costs and production time impossible; * * * some contractors would probably underestimate their costs and assume ruinous obligations * * *." U. S. Brief, 20.[3]

Such contractors had little choice for, as Senator McCarran said,

> "in time of war, contractors are not free to exercise their own determination with respect to whether they will take war contracts; if they refuse, their plants may be taken over; furthermore, they cannot get materials for normal production." 96 Cong. Rec. (Unbound) 14870-71.

It was the recital of such hardship cases that moved Senator McCarran to declare that such contractors

> "would be entitled to equitable relief, fair relief.
>
> "All the Government wants to do is deal fairly with those who aided the Government in its great struggle." Hearings, 66.

The "history" on which the Government rests its case will not support the burden. It repeatedly invokes some words of Senator McCarran and of "the Judiciary Committees of both Houses," U. S. Brief, 30-31. But the Senator and both Committees have excoriatingly repudiated

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[3] "The demands for war equipment and supplies were so great in volume, were for such new types of products, were subject to so many changes in specifications and were subject to such pressing demands for delivery that accurate advance estimates of cost were out of the question." *Lichter* v. *United States*, 334 U. S. 742, 767 (1948).

the construction put upon the Lucas Act by the Government. *Infra,* pp. 22-24; see our Main Brief, 23-27.

It is true that Senator Lucas, in *introducing* the bill referred to the administrative view that relief was cut off by the cessation of hostilities. U. S. Brief, 28. And certain remarks made by him at the outset of the Hearings are of the same tenor. *Id.* at 28-29. But these remarks, addressed to the original draft of the bill, are without significance, for the bill was completely redrafted in Committee because of the testimony which followed the remarks.[4] The three cases which he discussed with the Committee did at first appear to be cases "caught" by VJ-Day, U. S. Brief, note 14, for which, in other words, no relief could be had under the First War Powers Act. But when Colonel Holland later testified that no relief could be had in these cases—Enjay, Lake State, Hanover Mills—for reasons apart from the cessation of hostilities (see Main Brief, note 4), and was asked whether the new bill would "accomplish relief in these cases," he replied that

> "relief could be granted under the terms as written * * *." Hearings, 56.

Senator McCarran's remarks on the floor (U. S. Brief, 29-30) are at best illustrative, and do not derogate from the sweeping relief he espoused in the Hearings (Main Brief, 9-10; note 5), and which he has since categorically stated it was the purpose of the Lucas Act to grant, *infra,* p. 22. The Committee reports were likewise illustrative, and as this Court has held, they cannot narrow the statute when its terms and its history indicate a broader intention. Main Brief, 14. That history is detailed in the Hear-

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[4] "Extensive hearings were held by the Committee. * * * After the hearings were concluded, we submitted the matter for reconsideration from the standpoint of redrafting the language of the bill. The language was carefully redrafted so as to limit it in every respect and to protect it in every respect." Senator McCarran at 92 Cong. Rec. 9992.

It needed "protection" against renewed administrative attenuation. See Main Brief, note 12.

ings. We urge the Court to read the Hearings, which are no more extensive than the Government's brief, because they leave no room for the tissue of speculation woven by the Government.

Against the striking change of statutory language, which differentiates the Lucas Act from its predecessors, the Government opposes an argument composed of strained inferences. First, it argues that

> "Only agencies empowered to grant War Powers Act relief may grant Lucas Act relief * * *." U. S. Brief, 11.

What was more natural? Amendment of a statute ordinarily affords no occasion for displacing its administrators, and their retention as administrators is therefore meaningless. Second, it argues that

> "only contractors who filed 'requests for relief'—the special designation for War Powers Act applications[5] —before VJ-Day can claim under the new Act; similarly, the statute characterizes awards under the new Act as 'relief' * * *." *Ibid.*

There is no indication that the VJ-Day limitation had any purpose beyond naming a convenient cut-off date. And Congress would have been hard put to find a fitting substitute for the word "relief" once it determined to grant relief from losses, as the Hearings and statute show it did. It had no occasion to search for a substitute term to accomplish its broader purpose since the word "relief" is not even mentioned in either the First War Powers Act or Executive Order 9001 issued thereunder. Third, the Government seeks to wrest a favorable inference from the fact that under the Lucas Act

> "consideration must be given to all prior First War Powers Act and like relief." *Ibid.*

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[5] We shall hereinafter dispose of this attempt to convert the "request for relief" into a term of art. *Infra*, pp. 10-11.

To be sure, § 2 provides that the administrators

> "shall not allow any amount in excess of the amount of the net loss"

and, as a precaution, provides that they

> "shall consider * * * (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise * * *."

This was merely to make certain that the administrators would not duplicate earlier relief or award relief in excess of net losses. Indeed, §2 indicates, as is made more plain by § 3, that the earlier grant of First War Powers Act relief, presumably granted to the full by conscientious administrators, was not to preclude the grant of "further relief" under the Lucas Act.

Finally, the Government urges,

> "the new Act's phrases 'equitable claims' and 'fair and equitable settlement of claims' are shorthand expressions directly referring to the unfair discrimination among certain contractors, following the ending of hostilities, which Congress desired to redress, as well as to the facts that War Powers Act relief was not demandable as of right and involved considerations of fair and honorable dealing." *Ibid.*

To the extent that this argument rehashes the legislative history argument, it requires no further discussion. But the Government's speculation as to the origin of the terms "equitable claims" and "fair and equitable settlement of claims" conflicts so sharply with that history as to merit comment. We have shown that the initial phrase "to prevent a manifest injustice" was at once perceived to be broader than the First War Powers phrase "facilitate the prosecution of the war." Main Brief, 8. And Senator McCarran stated that the contractors who had been denied relief because of the administrators' illiberal interpretations (Main Brief, note 5), were

> "entitled to equitable relief, *fair* relief"

because

> "the Government wants to * * * *deal fairly* with those who aided the Government in its great struggle." Hearings, 66.

Thus, equitable claims were equated with fair claims, claims which had theretofore been denied, and which would again be denied if the "equity" dispensed by the administrators under the First War Powers Act were to be made the criterion. The principle of "equity" did not, as the Government suggests, replace

> "the notion of 'manifest injustice', which appeared in the bill as introduced * * * because of the feeling that the latter term was too vague and indefinite." U. S. Brief, note 23.

To the contrary, Senator Revercomb and the General Accounting Office representative agreed that "manifest injustice" would afford relief for a

> "claim based upon actual loss without the fault of the contractor," Hearings, 27,

and the shift from "manifest injustice" was made because

> "these words * * * are almost identical in their meaning with the words 'upon a fair and equitable basis' * * *." Hearings, 81.

The attempt of the Government to equate First War Powers Act relief with Lucas Act relief fails first, because the Lucas Act was elaborately drafted in entirely different terms in preference to a mere temporal extension of its predecessor, and second, because the Lucas Act sought to deal "fairly" with contractors who had suffered losses in helping the war effort, while the First War Powers Act granted relief solely to facilitate the prosecution of the war, losses alone affording no basis for relief thereunder.

II.

REQUEST FOR RELIEF.

The Government's argument on this score in large part restates its contention that Lucas Act relief is no broader than the relief earlier afforded under the War Powers Act. Since Congress did in fact design broader relief, insistence on "filing" requirements which claimants could not have possibly divined—because the Lucas Act authorized relief only as to requests filed prior to its enactment[6]—would abort the intended relief. Congress did not at once grant relief and make relief impossible by insisting on impossible formalities.

The Government builds on shifting sands when it urges that the phrase "request for relief" was

> "*adopted* from administrative usage under the First War Powers Act * * *." U. S. Brief, 45.

For the phrase "request for relief" is not mentioned in either that Act, or Executive Order 9001 issued thereunder. Nor is there the slightest evidence that Congress was advised during consideration of the Lucas Act that the phrase "request for relief" had any peculiar significance. It was not even defined in Executive Order 9786 issued under the Lucas Act. Only now does the Government seek to graft an obscure administrative usage, if indeed there was such a usage, upon the Lucas Act. Such an argument is rejected under the "re-enactment rule,"[7] and has no more merit

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[6] §3 limits relief to losses with respect to which written requests for relief were filed on or before August 14, 1945. The Lucas Act became effective August 7, 1946.

[7] "The doctrine of statutory incorporation of a prior administrative ruling by reenactment without change is founded upon the belief, however fictitious, that the *members of Congress had some knowledge of the prior ruling.*" *Commissioner of Internal Revenue* v. *Sun Pipe Line Co.*, 126 F. (2d) 888, 892 (C. A. 3d, 1942).

The Government adduced no proof that Congress had any knowledge of any unusual usage of the phrase "request for relief," or

when a statute is first enacted. A contrary rule would enable administrators to amend legislation by later pulling inconspicuous administrative practices out of the drawer. And the use by various departmental spokesmen at the hearings of differing terms to characterize applications for adjustment plainly shows that the phrase was not a term of art even among those administering the War Powers Act.[8]

Against this background, we turn to the "authoritative expositions" which the Government states it would be "self-imposed blindness" to ignore. U. S. Brief, 39. These "expositions" are publications in a case book and a legal periodical, one of which is by a former counsel to a branch of the Army Service Forces. U. S. Brief, notes 8 and 9. The publications were not of course called to the attention of Congress, and are therefore not "revealing [of] the legislative purpose." *Id.* at 39-40. Moreover, the Armed Services were so thoroughly discredited in the course of the Hearings as to lack any "authority" whatsoever. Main Brief, notes 5, 12. Reliance is likewise placed on Executive Order 9786 issued under the Lucas Act. U. S. Brief, 40, 33. The Order entirely omitted to define "request for relief"—that was an unhappy administrative afterthought.

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that the usage was so notorious that Congress may be presumed to have possessed that knowledge. Cf. *Iselin* v. *United States*, 270 U. S. 245, 251 (1926). And this Court has reversed a judicial interpretation which antedated the reenactment of a statute where "Congress may not have had its attention directed to an undesirable decision." *Helvering* v. *Hallock*, 309 U. S. 106, 120 (1940).

[8] Thus the Secretary of War referred to "the petition for relief," Hearings, 6, which seemed to be the phrase generally used by Army officers, *Id.* at 18; see also *Id.* at 16. General Corbin, Quartermaster General, preferred "application for relief," *Id.* at 33. The Navy used the terms "request for modifications, amendment, or settlement," *Id.* at 68, and "applications for amendments or modifications," *Id.* at 74-75. A contractor testifying before the Senate Committee spoke of "applications for relief." *Id.* at 25. The representative of the General Accounting Office used the phrase "claims for losses," *Id.* at 29; and Chairman McCarran spoke of an "application for correction of * * * losses." *Id.* at 48.

Plainly, therefore, the "request for relief" phrase was not "adopted from administrative usage under the First War Powers Act," U. S. Brief, 45, nor from "authoritative expositions" of the purpose of the Congress. Instead, the Congress, as Senator Lucas simply stated, was thinking

> "primarily about where contractors are applying for relief *in one form or another.*" Hearings, 20.

The "request for relief" was the artless reflection of the Congressional desire to rescue unfortunate contractors from their losses, not to hamstring the relief so plainly designed. Read naturally in light of the beneficent purpose of the Act, "request for relief" includes any writing seasonably filed which showed on its face that losses had been incurred and that the contractor was seeking to be made whole, whether by a claim for extra compensation, or for adjustment, or the like.

The Government challenges the sufficiency of an invoice which "makes no mention of losses." U. S. Brief, 42. Such an invoice would not, of course, normally anticipate denial. Moreover, in most cases it was futile to seek relief from denial of losses which the Government by illiberal interpretations had disabled itself from giving. The Government also rejects invoices on the ground that they

> "cannot well fit into the category of 'losses' until they are finally acted upon, since no loss can exist until the claim is denied in whole or in part." U. S. Brief, 45.

The argument proves too much. Since the test of a proper request for relief is its status as of August 14, 1945 (§ 3), it would follow that failure prior thereto to deny even a plainly labelled request for relief from losses would preclude submitting a claim for losses under the Lucas Act. This would have discriminated against claims pending on August 14, 1945, in favor of claims denied prior thereto. If the answer be that there is still time to establish a loss by denial, there is no bar to showing the loss by administrative denial of an invoice claim.

Let us emerge from such foggy speculations into the sunlight of reality. It was the existence of losses that was made controlling, not the piece of paper from which such losses were to be discerned. Section 3 of the Lucas Act does not so much as mention a "request for relief *from losses.*" It merely limits relief to losses.

> "*with respect to which* a written request for relief was filed * * *."

If there were losses, the invoice filed "with respect" thereto is a sufficient request for relief. If an invoice discloses increased costs due to Governmental changes of specifications, to unavoidable delays and the like and that the cost of performance exceeds the contract costs; in a word, if computation on the face of the instrument indicates that losses were incufred, that writing, we submit, constitutes a sufficient request for relief. It was for this reason that in *Modern Engineering Co.* v. *United States*, 113 C. Cls. 272, 83 F. Supp. 346 (1949), the Court upheld invoices

> "claiming reimbursement for additional expense in connection with certain purchase orders, and which, on their face, show that plaintiff incurred losses."

By the same token, if the Government appropriates property so as to prevent performance under a contract, loss may be sustained in the execution of that contract without the fault or negligence of the contractor. To deny that claims for such losses are "requests for relief" is to revert to medieval niceties of pleading.

The folly of such niceties is revealed by the Government's attack upon the request for relief in *Howard Industries, Inc.* v. *United States*, 113 C. Cls. 231, 83 F. Supp. 337 (1949). U. S. Brief, 46-48. The loss there suffered was detailed in a letter which asked for a "redetermination of price," showed a "net deficit" and requested "as an adjustment of Contract Price" the payment of that deficit. When one suffers a deficit in performing a contract he

suffers a loss, and a request for adjustment of that deficit is a request for relief. There is not the faintest suggestion that the Government was misled or was not cognizant of the fact that additional relief was sought by the claim for just compensation in the *Fogarty* case, by the invoices in *Modern Engineering Co.* v. *United States*, *supra*, or the correspondence in the *Howard Industries* case. As the Court of Claims put it, the "request for relief" proviso merely means that applicants must have "given those agencies an opportunity to either grant or deny their claims."[9] No contention can be made that such opportunity was not afforded in these cases.

The Government's insistence upon form strikes a strange discord in an era which subordinates refinements of pleading to the attainment of substantive justice. *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197, 200-201 (1938). No more should be demanded of businessmen than of trained advocates. The Government's rejection of claims on these grounds stands condemned by the President himself as "technical."[10] We cannot attribute to Congress, on the one hand, an intention to grant far-reaching relief from losses, a fact evidenced by the face of the statute and driven home by the legislative history, and on the other hand an intention to render the statute impotent by insistence that claimants must prophetically have employed prior to August, 1945, the talismanic words first employed in the Lucas

[9] *Howard Industries, Inc.* v. *United States*, 83 F. Supp. at 337. See *Spicer* v. *United States*, 113 C. Cls. 267, 83 F. Supp. 345 (1949).

[10] In the veto message on H. R. 3436 the President said he would approve of a provision that would

> "2. Remove the basis for *technical rejection* by permitting either a request in writing for relief under the First War Powers Act, or a written demand for a payment of losses, or a written notice of sustained or impending loss, if timely filed, to be accepted as a basis for claim." H. R. Doc. No. 629, 81st Cong., 2d Sess., 4 (1950).

These "technical" grounds for rejection were first superimposed upon the unambiguous language of the statute by the President's subordinates.

Act in August, 1946. This is patently to frustrate the intention of Congress. Little wonder that Congress has since bitingly rebuked the administrators for such a construction. See *infra*, pp. 22-24; Main Brief, 23-28.

III.

A PRIOR SETTLEMENT IS NOT A BAR.

It is too plain for argument that the statutory provision

> "a previous settlement * * * shall not operate to preclude further relief"

is nullified by the Executive Order direction that

> "no claim shall be considered if final action with respect thereto was taken"

prior to August 14, 1945.

The natural deductions from the face of the statute are fortified by the legislative history. Initially there had been a proviso that the relief granted

> "shall not be applicable to cases * * * which have been finally disposed of", Hearing, 1,

and the War Department sought to preserve the "finality" of "final settlements." Hearings, 6. But the original proviso was replaced by the present § 3 because Congress was told the settlement bar would exclude many cases which had been "decided adversely to the contractors," Hearings, 29, under the erroneous administrative interpretation.[11] The mere elision of the earlier "finality" provision, let alone the substitution of language expressly removing the bar of a prior settlement, would preclude administrative re-interpolation of the deleted section. *Border Pipe Line Co.* v. *Federal Power Commission*, 171 F. (2d) 149, 152 (App. D. C., 1948).

[11] The "reasons" for removing the settlement bar, cf. U. S. Brief, 65, are set forth in our Main Brief, 17-18.

These are simple, familiar propositions. To answer them the Government piles inference on inference for 28 pages of painfully involuted argument.[12]

First, the Government argues that the administrators are to act

> "in accordance with regulations to be prescribed by the President," U. S. Brief, 50

and attaches "capital significance" to the fact that "it was the President who issued the regulation." U. S. Brief, 73. Regulations must "carry out the purposes of the Act—not * * * amend it." *Miller* v. *United States*, 294 U. S. 435, 440 (1935). And see *Neuberger* v. *Commissioner of Internal Revenue*, 311 U. S. 83, 89 (1940). And the President can no more amend a statute by regulation than the lowliest administrator. Cf. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 420-433 (1935). The Government is not aided by *Hamilton* v. *Dillin*, 21 Wall. 73 (1875), U. S. Brief, 74, because there the statute authorized the President to act "in his discretion." By the same token, the administrators' "contemporaneous construction," U. S. Brief, 53,

> "must yield to the positive language of the statute." *Houghton* v. *Payne*, 194 U. S. 88, 100 (1904).[13]

Second, the Government seeks to establish an "intimate connection with First War Powers Act *discretionary relief*," U. S. Brief, 11, a "*breadth of discretion* in issuing regulations" because of the subject matter, i.e., "gratuity legislation." *Id.* at 54.

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[12] This process of "interpretation" was the very thing the Committee Chairman sought to avoid:

> "will the War Department have to *interpret* that bill, or *shall we make it so plain* that it will lay the road wide open for the War Department to render justice in a given case?" Hearings, 50.

[13] The Government itself recognizes that a contemporaneous construction may be "overturned" if a "different construction is plainly required." U. S. Brief, 53. A construction which nullifies an express statutory provision "plainly requires" to be overturned.

a) Now the cat is out of the bag: the administrators unabashedly are seeking to recapture the discretion they once had and which the Lucas Act withdrew. The War Powers Act had lodged discretion in the President, authorizing him to grant relief

> "whenever *he deems* such action would facilitate the prosecution of the war."

The original draft of the Lucas Act had also authorized relief

> "*whenever the head* of such department or agency *makes a determination* that such action is necessary to prevent a manifest injustice * * * ." Hearings, 1.[14]

But the dissatisfaction of the Senate Committee with the administrators' technical denials of relief, Main Brief, note 5, led it to cast the Act in completely non-discretionary terms. Hence, the Lucas Act authorized administrators to

> "settle equitable claims of contractors[15] * * * for losses * * * incurred * * * without fault or negligence on their part,"

not those which *they deemed* should be settled. And to put the matter beyond peradventure, § 6 provided for a judicial trial *de novo:*

> "any claimant * * * dissatisfied with the action * * * of the Government in either granting or denying his claim, * * * shall have the right * * * to file a petition with any Federal district court * * * asking a *determination by the court of the equities involved* in such claims * * *."

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[14] The original bill was criticized by the representative of the General Accounting Office because cessation of the war made it no longer

> "necessary to delegate all of this authority * * * to the President." Hearings, 26.

[15] The governing criteria were enumerated in § 2.

It further provided that

> "the court * * * shall have jurisdiction to *determine the amount*, if any, to which such claimant * * * may be equitably entitled * * * and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court * * * ." [16]

Thus the door was shut and bolted against administrative discretion.

b) Administrators are given no license to gut a statute because the subject matter is "gratuity legislation." Only last term this Court reminded the Government:

> "The power of the purse belongs to Congress, and Congress has determined that the price for greater fairness is not too high." *Wong Yang Sung* v. *McGrath*, 94 L. Ed. 383, 391 (1950).

The Government's citations to *Hamilton* v. *Dillin*, 21 Wall. 73, 88 (1875) and *Work* v. *Rives*, 267 U. S. 175 (1925), are of no avail. The *Rives* case involved a statute directing that

> "no claims shall be paid unless it shall appear *to the satisfaction* of said Secretary * * * " *Id.* at 179,

that certain conditions obtain. In the *Dillin* case, the statute likewise provided that

> "the President may, in his *discretion*, license and permit commercial intercourse."

Such discretion was with good reason eliminated from the Lucas Act.

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[16] Compare the statute in *Work* v. *Rives*, 267 U. S. 175 (1925), which made payment dependent upon

> "the satisfaction of said Secretary," *Id.* at 179,

and where the Court noted that

> "it did not * * * make the losses recoverable in a court, but expressly provided otherwise." *Id.* at 181-182.

c) This pointed removal of the prior discretion likewise deflates the Government's reliance on the *title* of the Lucas Act:

> "To Authorize Relief in certain cases * * * ."

The "certain" cases are described in the body of the statute, and the title confers no power on the President to pick and choose amongst them,[17] and certainly not to negate the provision that a prior settlement shall be no bar to "further relief."

d) Still another claim to discretion is rested on the argument that

> "Section 2(a) provides that the amount of a contractor's net loss on all his contracts * * * should constitute an upper limit on the relief—not, it should be emphasized, an amount required to be granted." U. S. Brief, 51.

In directing that administrators

> "shall not allow any amount *in excess* of the amount of the net losses,"

and that they should consider, i.e. deduct, "relief [already] granted," § 2(a) manifestly did not authorize them to afford only such relief as they pleased, in total disregard of net losses suffered. Cf. *supra*, p. 8. Moreover, by § 6, the Courts too are authorized *de novo* to "determine the amount * * * to which the claimant may be equitably entitled," and there is not the slightest reason to believe that the administrators were given power to curtail the judicial jurisdiction.

Finally, assuming the non-existent "discretion" and stretching it to the furthest reach, it still does not extend

[17] "the title of an act cannot overcome the meaning of plain and unambiguous words in its body." *Caminetti* v. *United States*, 242 U. S. 470, 490 (1917) and cases cited.

to nullification of an express statutory mandate that "further relief" be granted despite a prior settlement.

Third, the Government contends that it was necessary to define terms such as "fair and equitable settlement," U. S. Brief, 51-52, and that the intention of Congress in § 3 is to be derived from a study of the entire context of the statute and its purposes. *Id.* at 65. No study of the context can justify reading "white" as "black", all the less since the Congress plainly expressed its intention to remove the bar of prior settlements. Nor can the President under the guise of defining the § 2 "fair and equitable settlement" or "*confining* the Act to 'equitable claims'", *Id.* at 58, read out of the statute the § 3 mandate that a prior settlement shall not be a bar to "further relief."

Fourth, the Government raises the spectre of "potentially enormous" liability, U. S. Brief, 66, of "an administrative burden of potentially impossible proportions." *Id.* at 62. Senator McCarran stated that

> "There are about 290 claimants under the Lucas Act," 96 Cong. Rec. (unbound) 14,871,

and the Government stated in its Memorandum on Certiorari, pp. 1-2, that the amount involved in the 90 pending court cases was $17,000,000. Presumably the larger claims are in court; at worst, the remaining 200 claimants are unlikely to exceed triple the $17,000,000 figure. Were it more, Congress insists that they be paid, and to it "belongs the power of the purse." *Wong Yang Sung* v. *McGrath*, 94 L. Ed. 383, 391 (1950).[18]

Fifth, the Government urges that the President justifiably believed the Act to be a mere temporal extension of the First War Powers Act, and had "no reason to believe" that Congress intended to reopen the cases which had been settled. U. S. Brief, 57-58. The terms of § 3 furnished

[18] The Government's references to "insurance," to a "guarantee [of] all war contractors against loss," U. S. Brief, 24, 10, 58, overlook the *prospective* nature of guarantees and insurance. Congress has merely come to the rescue of 290 contractors, as it may.

him a glaring reason. They should, indeed, have led him to revise his erroneous conception of the Lucas Act's scope. For § 3 was cast in terms of "further relief," after relief had been granted under the predecessor acts. Main Brief, 6.

Sixth, and last, the Government seeks to save some meaning for § 3 by confining it to cases where "some," i.e. partial relief had been granted, U. S. Brief, 59-60, and it argues that § 3 does not refer to a previous settlement under the First War Powers Act "of the same request now relied upon." U. S. Brief, 61. There is no basis whatsoever in the Hearings for changing the Congressional language to read "a previous *partial* settlement." To the contrary, the legislative history shows a pre-occupation with cases "decided adversely to the contractors," i.e., cases "settled under the First War Powers Act" which "could not be reopened now." Hearings, 16; Main Brief, 16-18. Congress abandoned the initial bar of cases "finally [not partially] disposed of", Hearings, 1, and, by § 2(c), it unqualifiedly directed the administrators to take account of prior *relief* granted," not "*partial* relief granted." In short, Congress contemplated that all settlements, comprehensive as well as partial, were not to preclude further relief. To exclude complete settlements is unjustifiably to rewrite the statute. On what ground, indeed, was Congress to discriminate in favor of one whose claim had been partially settled against one whose claim had been completely yet unjustly settled? Certainly, not because of the "impossible" burden assigned by the Government, which, we have shown, is chimerical.

IV.

CONGRESS HAS A SECOND TIME REPUDIATED THE ADMINISTRATORS' POSITION.

The Government blithely dismisses the blistering Congressional statements which accompanied the first and second attempts of Congress to blast the erroneous administrative interpretation out of the road because they

> "are irreconcilable with the descriptions of the Lucas Act by the Congress which passed it." U. S. Brief, 72.

The Hearings of the Lucas Act demonstrate that it is the administrators, not the Congress, who seek to put a new gloss on the Act.

We turn to Senator McCarran's[19] detailed comment on the second veto because, as he stated,

> "The Congress wrote this legislation, and the Congress should be presumed to know something about what was intended." 96 Cong. Rec. (unbound) 14,870.

1) The Broader Scope of the Lucas Act.

On this issue Chairman McCarran stated:

> "It was the intent of the Congress, in passing the Lucas Act, to offer relief beyond that afforded by the First War Powers Act. The administrative interpretation and the executive order have prevented the full effectuation of that intent." *Id.* at 14,868.

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[19] Senator McCarran described himself as

> "one who participated in the drafting of the original Lucas Act, who was Chairman of the Committee on the Judiciary at the time the act was approved by the Committee, who handled the act on the floor of the Senate, and who has followed it closely ever since." 96 Cong. Rec. (unbound) 14,866.

The Government's citation of *United States* v. *United Mine Workers*, 330 U. S. 258, 281-282 (1947), U. S. Brief, 72, for the suggestion that opinions expressed in a later Congress are without bearing is therefore beside the point. In that case, Senators were debating the War Labor Disputes Act 11 years after enactment of the Norris-La Guardia Act and their expressions were rejected as guides to constructions of the latter Act because

> "They were expressed by Senators, some of whom were not members of the Senate in 1932, and none of whom was on the Senate Judiciary Committee which reported the bill." 330 U. S. at 281-282.

In the present case, moreover, the subsequent Congress and both of its Judiciary Committees were clarifying the Lucas Act, and they took exactly the view expressed by Senator McCarran. See also the 1947 Congressional comment, one year after the Lucas Act, U. S. Brief, 67, which the Government dismisses because it professes to know better than the Congress what the Congress meant.

And, he repeated,

> "the Lucas Act, by its plain language, was intended to grant relief beyond that afforded by the First War Powers Act; and the President's Executive Order contravened the statute in this regard." *Id.* at 14,870.

2) The Request for Relief.

The President labelled as a "departure" from the intent of the Lucas Act, the

> "definition of a request for relief * * * which greatly relaxes the existing requirements that claims be founded upon a specific application for the extraordinary relief which was allowable under the First War Powers Act * * *." *Id.* at 13,143.

To this, Chairman McCarran properly replied:

> "This is an erroneous statement. It speaks of an 'existing requirement' which does not exist. The Lucas Act contains no such requirement. The Lucas Act contains only two requirements with regard to the request for relief, namely, that it must have been in writing, and must have been filed on or before August 14, 1945." *Id.* at 14,870.

3) The Settlement Provision.

The second veto message stated that the second bill, S. 3906,

> "would not preclude the reopening of an indeterminate number of cases that had been settled * * *." *Id.* at 13,143.

But, as Chairman McCarran stated:

> "The Lucas Act, as it now stands on the statute books * * * specifically provides that a 'previous settlement under the First War Powers Act shall not operate to preclude further relief otherwise allowable under this act.'" *Id.* at 14,870.

And the Executive Order provision to the contrary, said he,

> "has attempted to contradict that plain language of the law." *Ibid;* see also *id.* at 14,865.[20]

In sum, said Senator McCarran, the

> "regulations severely restricted the act, and in some respects were directly contrary to the plain language of the act." *Id.* at 14,870

and the President and administrators

> "have denied the Lucas Act effect." *Id.* at 14,869.

It is astonishing to find the administrators now claiming a greater power to divine the intention of Congress than Congress itself.

More important because of its disturbing constitutional implications is the Government's statement that the recent Congressional construction of its own Act is "effectively neutralized" by the President's veto statement

> "that he construed the Lucas Act, *at the time he gave it his approval*, very differently from the way in which the sponsors of the amendatory bills now say that they interpreted it * * *." U. S. Brief, 73.

The Government, in fact, would have it that the

> "President is more 'Chief Legislator' than 'Chief Executive.'" U. S. Brief, 75.

It offers Professor Corwin[21] as one of its two witnesses. *Ibid.* But Corwin has rejected even a Presidential statement made *at the time of signing*[22] an enactment:

> "an act of Congress gets its intention from the houses, in which the constitution specifically vests [not *some*

[20] The "real basis of the President's complaint is the failure of this bill to change the Lucas Act in the way the President thinks it should be changed." *Id.* at 14,869.

[21] Corwin, The President: Office and Powers, c. VII (3d ed., 1948).

[22] No such statement was made at the time of signing the Lucas Act.

> but] '*all* the legislative powers herein granted.' For a court to vary an interpretation of an act of Congress in deference to something said by the President at the time of signing it would be to attribute to the latter the *power to foist upon the houses intentions they never entertained* and thereby endow him with a legislative power not shared by Congress." Corwin, *The President: Office and Powers*, 344 (3d ed. 1948).

If expressions of presidential understanding are irrelevant when the statute is signed, *a fortiori*, his later assertions, when he vetoes bills designed to reaffirm the original Congressional intent, as to how he construed the Act at the time of signing are of no significance.

To evade the impact of the subsequent legislative history, the Government observes that the Senate, which had twice approved clarifying bills, failed to override the President's second veto.[23] U. S. Brief, 69, 72. The Government has itself noted that "the President's veto is normally effective in nine cases out of ten." *Id.* at 76.[24] But it failed to realize that when a bill is passed over the President's veto,

> "the reason usually lies in the pressure of organized opinion outside so strong that the Congress is not willing to take the risk of leaving the presidential veto as final." Laski, *The American Presidency*, 148-149 (1940).

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[23] The Government also attempts to differentiate the "later" Congress which passed the clarifying bills from the Congress which adopted the Lucas Act. But the later Congress included the author of the Lucas Act, the Chairman of the Senate Committee which redrafted the Act who vigorously denounced the executive construction, and the Chairman of the House Subcommittee, Francis E. Walter, who approved the Lucas Act, and whose Committee later condemned the Government's "erroneous interpretation." Main Brief, 23. The Government's elaborate efforts to depreciate the import of the subsequent legislative history is in itself the most eloquent testimony of its significance.

[24] As of 1947 only 55 of 771 vetoes had been overturned: "It must be concluded that this record establishes the practical absolutivity of the veto." Patterson, *Presidential Government in the United States*, 53-54 (1947).

The Lucas Act amendment vetoes were not overriden because there was no risk in ignoring the 290 claimants, *supra*, p. 20, who could exert no appreciable pressure.[25] In consequence, the failure to override the Presidential veto can scarcely be said to "neutralize" the vigorous Congressional condemnation of the restrictive administrative interpretation.

This case discloses an unflagging, last-ditch administrative campaign to defeat the Congressional will. Finding their pleas to the Congress during the Lucas Act Hearings for restrictive legislation (Main Brief, note 10, p. 15) rejected, the administrators renewed the battle by drafting an Executive Order which nullified the Act. And we make so bold as to state that they drafted the veto messages which frustrated Congress' subsequent attempts to call a halt to their nullification of the Act.

Senator McCarran justly stated that the second veto was tantamount to the position

> "that the Congress may not, by subsequent enactment, correct what it considers to be executive or administrative misinterpretation of a previous act of Congress." 96 Cong. Rec. (unbound) 14,869.

It is this fact which renders the present controversy so important. Without the frustration of the successive Congressional attempts to rescue the Lucas Act from its administrators, this case would merely represent another exercise in statutory construction. Vindication of popular rule therefore demands that this Court carefully scrutinize the Lucas Act and its legislative history so that the admin-

[25] And there is the natural reluctance of the party in power to engage in an unseemly squabble with its party chief once his views have been manifested. Cf. 31 American Political Science Review 54-56 (1937).

istrators may be restored to the subordinate position which they occupy under our system of government.

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